Open Meeting Law
Frequently Asked Questions

Vermont's Open Meeting Law was significantly amended in 2014. The VLCT Municipal Assistance Center has written a primer on the law, with *recent changes to the law in italics*. The law casts a very broad net and, as you will see from reading this document, it **generally applies whenever a majority of the members of a municipal board, council, commission, committee, or subcommittee have a conversation or make a decision about municipal business.**

No. 143. An act relating to the open meeting law.

(H.497)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 1 V.S.A. § 310 is amended to read:

§ 310. DEFINITIONS

As used in this subchapter:

(1) "Deliberations" means weighing, examining, and discussing the reasons for and against an act or decision, but expressly excludes the taking of evidence and the arguments of parties.

(2) "Meeting" means a gathering of a quorum of the members of a public body for the purpose of discussing the business of the public body or for the purpose of taking action. "Meeting" shall not mean written correspondence or an electronic communication, including e-mail, telephone, or teleconferencing, between members of a public body for the purpose of scheduling a meeting, organizing an agenda, or distributing materials to discuss at a meeting, provided that such a written correspondence or such an electronic communication that results in written or recorded information shall be available for inspection and copying under the Public Records Act as set forth in chapter 5, subchapter 3 of this title.

(3) "Public body" means any board, council, or commission of the ~~state~~ State or one or more of its political subdivisions, any board, council, or commission of any agency, authority, or instrumentality of the ~~state~~ State or one or more of its political subdivisions, or any committee of any of the foregoing boards, councils, or commissions, except that "public body" does not

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Actions to be taken before July 1, 2014

1. **What do Vermont municipalities need to do before July 1, 2014, to comply with the law?**

   a. Designate locations in your municipality where notices and agendas for meetings will be posted. (See #10 and #13 below.)
   b. Prepare your municipality's website, if there is one, so that you will be ready to post agendas before meetings (see #10) and minutes five days after those meetings occur. (See #14.) Otherwise, you should de-activate the website to avoid violating this requirement.

   Contact the Municipal Assistance Center with any questions at 800-649-7915 or info@vlct.org.

The Law

2. **What is the Open Meeting Law?**
   The Open Meeting Law provides that "[a]ll meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title [on executive sessions]." 1 V.S.A. § 312(a). The intent of the law is to create transparency in government by requiring advance public notice and an opportunity for public participation in governmental decisions. The law is found in 1 V.S.A. §§ 310-314. The amended sections of the law are found in the text of Act 143, which is archived at http://www.leg.state.vt.us/DOCS/2014/ACTS/ACT143.PDF.

3. **What does the Open Meeting Law require?**
   The law requires that you:
   - Publicly announce your meetings. 1 V.S.A. §§ 312(c), 310(4)
   - *Prepare an agenda for regular and special meetings and post that agenda.* 1 V.S.A. § 312(d)
   - Conduct the business of the municipality in open meetings (unless specifically exempted). 1 V.S.A. § 312(a)
   - Allow for public comment at your meetings (subject to reasonable rules). 1 V.S.A. § 312(h)
   - Take minutes at your meetings and make those minutes available *within 5 days, including on your website, if there is one.* 1 V.S.A. § 312(b)
   - *Respond in a timely manner when there is a complaint/allegation of violation of the law.* 1 V.S.A. § 314(b)

4. **To whom does the law apply?**
   Every "public body" of a municipality. **A public body is any board, council, commission, committee, or subcommittee of a municipality.** 1 V.S.A. § 310(3). This includes selectboards, prudential committees, planning commissions, conservation commissions, cemetery commissions, development review boards, boards of civil authority, boards of health, zoning boards of adjustment, etc., as well as subcommittees of those bodies. *It does not apply to community justice boards or community justice centers.* 24 V.S.A. § 1964(b).

5. **When does the law apply?**
   The requirements of the law are triggered whenever a "quorum" of the body is "meeting." A **quorum** is a majority of the total number of members on the body. A **meeting** means a gathering of a quorum of the members of a public body for the purpose of discussing the business of the body or for the purpose of taking any action. 1 V.S.A. § 310(2).

   You don't all have to be in the same room at the same time for it to be considered a meeting; the law applies regardless of the physical location of the members. Therefore a phone conversation can still be a meeting for purposes of the law. **Furthermore, time is not a factor.** Individual members may

make contributions to a collected conversation at different times and from different places. This means that a discussion by email may violate the law.

Wait! We can't talk on the phone or discuss town business over coffee?!
A majority of the members of a public body may never discuss or make decisions about the business of the municipality unless they are in a duly warned open meeting. What this means for a three-person selectboard is that no two selectboard members may ever discuss municipal business outside of an open meeting. On a five-person commission, no three of them may participate. However, any of the members of a public body may talk about routine administrative matters (such as scheduling meetings) without violating the law.

Email, Phone, and Other Electronic Communication

6. **Can we ever use email?**
Email may be used for distribution of information but should not be used for discussion (don't hit "Reply All"), except for the following administrative exemption. *Email may also be used for purely administrative matters such as scheduling a meeting or creating an agenda. However, that email must be available for copying and inspection as a public record.* 1 V.S.A. § 310(2). In addition, there is a very limited exception to this rule for a public body doing a quasi-judicial deliberation – for instance, a development review board in the midst of drafting its written decision on a permit application. 1 V.S.A. § 312(e). Before taking advantage of this exception, the public body must have conducted a quasi-judicial hearing in public session, and then entered into deliberative session to discuss the evidence and decide how to proceed. (See #15-17.)

7. **If we are unable to attend a meeting, can we vote by email or proxy?**
No, you may never vote by email or by proxy. *However, if you attend a meeting by electronic means (e.g., speaker phone or Skype), you may vote, so long as you adhere to the requirements listed in #8, below.* 1 V.S.A. § 312(a)(2).

8. **Can a member attend a meeting by phone or Skype?**
Yes, *you may attend a meeting by electronic means (e.g., speaker phone, Skype, etc.) as long as you identify yourself when the meeting is convened, and you are able to hear and be heard throughout the meeting. Whenever one or more members attend electronically, voting must be done by roll call.* 1 V.S.A. § 312(a)(2).

What if a majority of us are not able to be physically present? Can we still have the meeting?
Yes. A quorum or more of a public body may participate electronically when there has been a prior public announcement of such arrangement and proper posting of such meeting that designates at least one physical location where a member of the public can attend and participate in the meeting. The public announcement and posting of the notice of such meeting must take place at least 24 hours in advance of such meeting, or as soon as practicable prior to an emergency meeting. At least one member of the body or at least one staff person or other designee must be present at that physical location. Each member that attends electronically must identify himself or herself when the meeting is convened, and must be able to hear and be heard throughout the meeting. Any voting must be done by roll call. 1 V.S.A. § 312(a)(2).

Agendas

9. **Do we need to have an agenda for every meeting?**
A written agenda must be created in advance of every regular or special meeting. 1 V.S.A. § 312(d).

10. Do we have to post the agenda?

Yes. At least 48 hours in advance of a regular meeting, and at least 24 hours in advance of a special meeting, an agenda must be posted in or near the municipal office and in at least two other designated public places in the municipality. 1 V.S.A. § 312(d). *Every municipality should, before July 1, officially designate two or more public places in the municipality at which agendas will be posted. In addition, the municipality must post the agendas of regular and special meetings to an official website, if one exists that is maintained or has been designated as the official website.* 1 V.S.A. § 312(d).

11. What are "designated places" for posting?

Every municipality should, before July 1, officially designate two or more public places in the municipality at which agendas of regular and special meetings will be posted (48 hours in advance) and where notices of special meetings will be posted (24 hours in advance). (See #10 and #13.) Our opinion is that the selectboard, council, or board of trustees can make this designation on behalf of all of the public bodies in the municipality, unless those bodies chose to do so independently.

12. Can we change an agenda after it is posted?

There are new limitations on when a meeting agenda may be modified: an item may only be added or removed from a meeting agenda as the first order of business at the meeting. 1 V.S.A. § 312(d)(3)(A). It is our opinion that this still allows you to table or otherwise postpone an action item when necessary, as in situations where additional information is needed before a decision may be made. *Other adjustments to an agenda (e.g., changing the order of items) may be made at any time during the meeting.* 1 V.S.A. § 312(d)(3)(B). Despite the above changes to the law, the standard for additions to an agenda generally remains the same – the body must give the public adequate notice and an opportunity to be heard. Weighed against those rights are the obligations of the public body to meet its deadlines and complete its legal requirements.

Posting, Noticing, and Announcing Meetings

13. What are the requirements for noticing and announcing a meeting?

Regular meetings of a public body (e.g., the planning commission meets every second Tuesday of the month) only need to be announced once: in a charter, local ordinance, or resolution. 1 V.S.A. § 312(c)(1). This is typically done in the public body's annual organizational meeting (first meeting of the year). *However, an agenda must be posted in advance of every regular meeting.* 1 V.S.A. § 312(d). (See #10.)

Special meetings (meetings that occur outside of that regular schedule) must be publicly announced at least 24 hours in advance. 1 V.S.A. § 312(c)(2). A meeting is publicly announced when notice is given to all the members of the board; to an editor, publisher, or news director of a newspaper or radio station serving the area; ***and*** *to any person who has requested notice of such meetings. 1 V.S.A. § 310(4). In addition, notices and agendas must be posted at the clerk's office and in at least two other designated public places in the municipality at least 24 hours in advance.* 1 V.S.A. § 312(c)(2).

Emergency meetings – which are held only when necessary to respond to an unforeseen occurrence or condition requiring immediate attention by the public body – may be held without posting, although some public notice must be given as soon as possible before the meeting. 1 V.S.A. § 312(c)(3).

Meeting Minutes

14. Do we have to take minutes at every meeting and provide them to the public?

Yes, minutes must be taken at every public meeting and must include at least the following information: members present, active participants at the meeting, motions made, and votes taken. 1 V.S.A. §

312(b)(1). Minutes must be available for inspection five days after the meeting. 1 V.S.A. § 312(b)(2). *In addition, minutes must be posted no later than five days after the meeting to an official website, if one exists, that is maintained or has been designated as the official website.* 1 V.S.A. § 312(b)(2). While a person who fails to post minutes to the official town website "shall not be subject to prosecution for such violation ... in connection with any meeting that occurs before July 1. 2015," we recommend complying with this requirement as soon as practicable. 2014 Vt. Acts and Resolves 143-6. Minutes need not be taken in executive session, but if they are, they are not subject to a public records request. 1 V.S.A. § 313(a).

Exceptions to the Open Meeting Law

15 Can we ever meet behind closed doors?

There are exceptions to the Open Meeting Law. The requirements of that law are not imposed on municipal bodies in the following situations:

- **Site inspections** 1 V.S.A. § 312(g): e.g., assessing damage or making tax assessments or abatements;
- **Routine administrative matters** 1 V.S.A. § 310(2): e.g., scheduling meetings, updating listers' cards;
- **Deliberative sessions within the context of a quasi-judicial proceeding** 1 V.S.A. § 312(e): e.g., hearings by a board of civil authority or zoning board, or employment termination (see #16 and #17.); and
- **Executive sessions** 1 V.S.A. § 312(a): See #18-21.

16. What is a deliberative session?

A deliberative session occurs only in conjunction with a quasi-judicial proceeding. These are situations where a public body (such as a selectboard or development review board) is acting like a judge or jury in that it takes evidence or testimony, and then weighs, examines, and discusses the reasons for or against an act or decision based on that evidence. 1 V.S.A. § 310(5). Examples include tax appeal hearings before the board of civil authority, vicious dog hearings, employment termination hearings, and zoning and subdivision hearings before a planning commission, zoning board of adjustment, or development review board. The exception for deliberative session is limited to quasi-judicial proceedings and does not apply simply because the public body wants time to deliberate in private.

17. Do we have to come out of deliberative session to issue or adopt a decision?

Generally, no. The law allows a public body to make a decision in deliberative session so long as the decision is issued in writing and the writing is a public record. 1 V.S.A. § 312(f). This means that after the public body has heard all of the evidence in a hearing, it may adjourn the public portion of the meeting, privately discuss and determine the merits of the issue, and then circulate drafts of an opinion for comment and approval prior to issuing its formal written decision.

18. What about executive session? When can we use that exception?

Rarely. An executive session is a closed portion of a public meeting and is allowed only in certain limited situations. Those that apply to municipal bodies are as follows:

1. Negotiating or securing real estate purchase *or lease* options. 1 V.S.A. § 313(a)(2)
2. The appointment or employment or evaluation of a public officer or employee (**but** the public body must make a final decision to hire or appoint in an open meeting ***and*** *it must explain the reasons for its final decision*). 1 V.S.A. § 313(a)(3)
3. A disciplinary or dismissal action against a public officer or employee (**but** such officer or employee has the right to a public hearing if formal charges are brought). 1 V.S.A. § 313(a)(4)
4. A clear and imminent peril to the public safety. 1 V.S.A. § 313(a)(5)
5. Discussion or consideration of records or documents that are exempt from the public records laws (**but** that does not give authority to discuss the general subject to which the document pertains). 1 V.S.A. § 313(a)(6)

6. *Municipal or school security or emergency response measures, the disclosure of which could jeopardize public safety.* 1 V.S.A. § 313(a)(10)
7. *When (and only when) the public body has made a specific finding that premature general public knowledge (see #19) would clearly place the state, municipality, other public body, or a person involved at a substantial disadvantage, it may go into executive session to discuss one of the following:*
   A. *contracts;*
   B. *labor relations agreements with employees;*
   C. *arbitration or mediation;*
   D. *grievances, other than tax grievances;*
   E. *pending or probable civil litigation or a prosecution, to which the public body is or may be a party; or*
   F. *confidential attorney-client communications made for the purpose of providing professional legal services to the body.*

   1 V.S.A. § 313(a)(1)

19. What is "premature general public knowledge" and how could that place someone at a substantial disadvantage?

In order to go into executive session to discuss, for example, a contract, there must be a reason that the contract cannot be discussed in open session. For instance, if the municipality is in the midst of a contract negotiation, it would not want to discuss its proposed terms as that would give the other side an advantage at the bargaining table. On the other hand, if the body is dealing with a contract that has already been signed and therefore is already a public matter, it likely does not have legal grounds to go into executive session because there is no disadvantage that will be suffered by disclosing the information.

20. When can we enter into executive session to discuss legal matters?

The amended law sets out two reasons to discuss legal issues in executive session once there has been a finding that premature general public knowledge would place a person or entity at a substantial disadvantage. First, you may discuss "pending or probable civil litigation or a prosecution, to which the public body may be a party." Second, you may discuss "confidential attorney-client communications made for the purpose of providing professional legal services to the body." 1 V.S.A. §§ 313(a)(1)(E) and (F). *Municipalities also retain their ability under the law to have their attorney, among others, present during executive sessions ["Attendance in executive session shall be limited to members of the public body, and, in the discretion of the public body, its staff, clerical assistants and legal counsel, and persons who are subjects of the discussion or whose information is needed." 1 V.S.A. § 313(b)] and to discuss correspondence from its attorney under 1 V.S.A. 317(c)(4). This provision of law exempts from the general rule of disclosure "records which, if made public ..., would cause the custodian to violate any statutory or common law privilege." The attorney-client privilege falls within this exemption.*

21. What are the logistics of entering into executive session?

A motion to go into executive session must be made during the open portion of a meeting and must indicate the nature of the business to be discussed. 1 V.S.A. §§ 313(a). We recommend that you state the specific statutory provision that gives authority to enter into such session ("Title 1, Section 313, Subsection ___ of the Vermont Statutes"). We also recommend that you provide in your motion as much information as you can, without giving away the details that necessitate the executive session. The motion must get the vote of a majority of the members present. 1 V.S.A. §§ 313(a).

22. How do we make a motion to enter into executive session?

The contents of the motion to enter into executive session depend on the reason for entering that executive session. To enter into executive session for the reasons noted in 1 V.S.A. §§ 313(a)(2)-(a)(10)

(listed in #18, parts 1-6), the motion merely needs to identify the topic of discussion and the specific statutory provision that gives authority to enter into such session. We also recommend that you provide in your motion sufficient information without giving away the details that necessitate the executive session. For instance: "Because it is time for our annual evaluation of the town manager, I move that we go into executive session to discuss the evaluation of a public officer or employee under the provisions of Title 1, Section 313(a)(3) of the Vermont Statutes."

To enter into executive session for the reasons noted in 1 V.S.A. §§ 313(a)(1) (listed in #18, part 7), you must make a finding that premature general public knowledge would place the public body or a person involved at a substantial disadvantage. 1 V.S.A. §§ 313(a)(1). Therefore, we recommend that you make **two separate motions**:

The **first motion** is to find that premature public discussion of the subject would cause the municipality (or a person) to suffer a substantial disadvantage. For instance, in the case of a contract under negotiation, the motion might be:

> "I move to find that premature general public knowledge of the town's contract with ABC Company would clearly place this selectboard at a substantial disadvantage, because the selectboard risks disclosing its negotiation strategy if it discusses the proposed contract terms in public."

In this hypothetical situation, the "substantial disadvantage" is the risk of losing the competitive edge in the negotiations by talking about the specific terms in public. For instance, once ABC Company hears the selectboard talk about the maximum price it can afford to pay, ABC Company may refuse to take anything less than that amount.

The **second motion** follows from the first and should recite the specific statutory provision that gives authority to enter into such session. For instance:

> "I move that we enter into executive session to discuss the town's contract with ABC Company under the provisions of Title 1, Section 313(a)(1)(A) of the Vermont Statutes."

It is important that the minutes show that there was a careful analysis of the need to enter into executive session before the first motion was made.

The amendment that requires a finding that *"premature general public knowledge would place the public body or a person involved"* is not actually a new requirement. Rather it is a reminder of the Vermont Supreme Court's holding in *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101, (1993) and therefore something municipal public bodies should have been doing all along. The Court in that case held:

> It is not unworkable for a public body to make a careful analysis of need before deciding to go into executive session. In fact, in the absence of a case-by-case determination, the legislative policy of openness would be frustrated by the impossibility of describing in categorical terms, without being over-inclusive, the permissible subjects of executive sessions. The exercise of judgment is inevitable. *Id.*

Given the Court's opinion in *Trombley*, the first motion described above should only be made after a discussion (careful analysis) in general terms (otherwise the purpose of entering executive session would be defeated) of why "premature general public knowledge would clearly place the public body, or a person involved at a substantial disadvantage."

Violations of the Open Meeting Law

23. What is the penalty for a person who violates the law?

A person who knowingly and willfully violates the Open Meeting Law, or who knowingly and willfully violates the Open Meeting Law on behalf of or at the behest of a public body, or who knowingly and intentionally participates in the wrongful exclusion of any person or persons from any relevant meeting may be guilty of a misdemeanor, punishable with a fine up to $500. 1 V.S.A. § 314(a). *Prior to instituting such action, the Attorney General must provide the public body with written notice of the alleged violation.* (See #24.)

24. What must the public body do if it receives written notice of an alleged violation?

*Immediately contact your town attorney or the Municipal Assistance Center! A public body must respond publicly within seven days **business** days after receiving written notice alleging a violation. Logistically, this means that it must immediately call a special meeting and provide adequate notice and warning of that meeting, including an agenda. (See #13.) During the meeting, the body should publicly discuss the situation and determine whether there was an **inadvertent** violation of the law. Based on this determination, it should issue a statement that either denies the allegation and states that no cure is necessary, or acknowledges that there was an **inadvertent** violation that will be cured within 14 **calendar** days. The public body should **not** publicly acknowledge a violation that is anything other than inadvertent without specific legal advice to do so. Failure to respond to the allegation within seven **business** days is treated as a denial.* 1 V.S.A. § 314(b). *In the event that the public body is sued for a violation of the law (see #25), the court will assess attorneys' fees and costs based in part on whether there was a timely and response to a notice of violation.* 1 V.S.A. § 314(d).

25. Can someone sue the municipality for a violation of the law?

*Yes, but that person must give the public body a chance to respond to the allegation, as per #24. After the public body issues an acknowledgement or denial of the violation, and after allowing 14 **calendar** days for the body to cure the violation, either the Attorney General or any person aggrieved by the alleged violation may bring suit against the public body in Superior Court. Such a suit must be brought within one year of the alleged violation.* 1 V.S.A. § 314(a).

26. Is the public body liable for attorneys' fees if it is sued for a violation of the law?

The law is unclear on this point. It states that a public body is not liable for attorneys' fees arising from litigation over an inadvertent violation of the law that is cured by the public body. 1 V.S.A. § 314(b)(1). However, the law also allows a court to assess attorneys' fees against a public body found to have violated the law. Before making this assessment, however, the court must consider whether the public body had a reasonable basis in fact and law for its position and that it acted in good faith, which includes responding to the notice of violation in a timely manner. 1 V.S.A. § 314(d).

27. When does the clock start ticking? When has the public body "received" an allegation of violation?

*This issue is important because receipt of a complaint or allegation starts the seven **business** day timeline for response. Unfortunately, the statute does not define when the "receipt" takes place. We therefore advise that you take the most conservative approach and consider that the public body has received an allegation when any member of the public body, or any municipal official who acts in an administrative capacity for the public body, receives a written complaint or allegation of violation. At that point, the public body has seven **business** days in which to respond.*

28. How does the public body "cure" the inadvertent violation?

An inadvertent violation is cured when there is either a ratification of the actions taken in violation of the law or a declaration that those actions are void. The public body must also adopt specific measures to prevent future violations of the law. 1 V.S.A. § 314(b)(4). *Such measures should be geared toward addressing the particular violation and might include, for example, training regarding the requirements of the Open Meeting Law, or implementation of internal procedures to assist the public body in future Open Meeting Law compliance, such as VLCT's "Revised Model Rules of Procedure," which we will post on our website (www.vlct.org) by July 1, 2014.*